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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME DENARD WHITE,

Defendant and Appellant.

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In re JEROME DENARD WHITE,

on Habeas Corpus.

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B167416

(Los Angeles County  
Super. Ct. No. NA052614)

B172424

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Tomson T. Ong, Judge. Affirmed as modified.

PETITION for Writ of Habeas Corpus. Petition denied.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney  
General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and  
Lisa J. Brault, Deputy Attorneys General, for Plaintiff and Respondent.

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Jerome Denard White appeals from the judgment entered after a jury convicted him of eight counts of robbery and one count of cocaine possession. He asserts there is insufficient evidence to support two of his robbery convictions (counts 5 and 13) and the matter should be remanded for the trial court to exercise its discretion to sentence him concurrently for the robbery convictions on counts 2 and 8. White also contends the restitution and parole revocation fines imposed by the trial court exceed statutory limits. We modify the amount of the restitution and parole revocation fines and, as modified, affirm the judgment. We also deny White's petition for writ of habeas corpus, which we have considered in conjunction with this appeal, finding no basis for his claims the trial court erroneously denied his pretrial motion for a live lineup and his defense counsel provided ineffective assistance.

### **PROCEDURAL BACKGROUND**

White was charged with 14 counts of robbery (Pen. Code, § 211<sup>1</sup>) and one count of cocaine possession (Health & Saf. Code, § 11350, subd. (a)). The information specially alleged as to all counts that White had personally used a firearm in committing the offenses (§ 12022.53, subd. (b)); had suffered two prior convictions for serious or violent felonies within the meaning of section 667, subdivision (a), which also qualified as "strikes" under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)); and had served four prior prison terms within the meaning of section 667.5, subdivision (b).

Before trial the court granted the People's motion to dismiss the robbery charge in count 10 and to strike the firearm allegations as to the robberies charged in counts 7 and 8. At the conclusion of their case-in-chief the People also moved to dismiss the robbery charges in counts 6, 9 and 12 because the witnesses for those offenses were not available to testify.

The jury found White guilty of eight counts of robbery (counts 1, 2, 4, 5, 7, 8, 13 and 14) and one count of cocaine possession (count 15) and found true the firearm

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise indicated.

allegations related to the robberies in counts 1, 2, 4, 5, 13 and 14.<sup>2</sup> The jury found White not guilty of the robbery charged in count 11 and could not reach a verdict on the robbery charged in count 3. After White waived his right to a jury trial, the court found true the prior conviction and prior prison term allegations.

The trial court sentenced White to 295 years to life in state prison: (1) a term of 25 years to life, plus 10 years for the firearm enhancement, for the robbery conviction on count 1; (2) five fully consecutive sentences of 25 years to life, plus 10 years for the firearm enhancement, for the robbery convictions on counts 2, 4, 5, 13 and 14; (3) three fully consecutive terms of 25 years to life for the robbery convictions on counts 7 and 8 and the conviction for cocaine possession; and (4) two consecutive five-year terms pursuant to section 667, subdivision (a)(1).<sup>3</sup> The trial court ordered White to pay a \$20,000 restitution fine and a \$20,000 parole revocation fine to be suspended unless parole is revoked.

## **DISCUSSION**

### *1. Substantial Evidence Supports the Robbery Convictions on Counts 5 and 13*

#### *a. Standard of Review*

In reviewing a claim of insufficient evidence in a criminal case, we determine whether, on the entire record viewed in the light most favorable to the People, any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; see also *People v. Holt* (1997) 15 Cal.4th 619, 667.) “In making this assessment the court looks to the whole record, not just the evidence favorable to the [defendant] to determine if the evidence supporting the verdict is substantial in light of other facts. [Citations.]” (*Holt*, at p. 667.)

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<sup>2</sup> The firearm enhancement allegation for the cocaine possession count apparently was dismissed.

<sup>3</sup> In sentencing White, the trial court made no reference to the true findings on the prior prison term allegations (§ 667.5, subd. (b)).

“Substantial evidence” in this context means “evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578; accord, *People v. Hill* (1998) 17 Cal.4th 800, 848-849 [““When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence -- i.e., evidence that is credible and of solid value -- from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.” [Citations.]”].) “Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt.” (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

b. *Count 5*

White contends the evidence is insufficient to prove he committed a February 19, 2002 robbery at a Baskin Robbins ice cream store in Long Beach because neither employee present in the store at the time of the robbery could identify White as the perpetrator. White’s argument is predicated on a mischaracterization of the evidence.

Although Richard Singam, one of the store employees, did not identify White as the perpetrator in a photographic lineup or at trial, his coemployee, Christina Villalobos, who was the named victim in count 5, selected White’s picture (the third photograph) out of a photographic lineup and said, “I would say that’s him.” Villalobos said the fourth photograph also looked like the perpetrator but added, “I would say number three looks more like him.” Contrary to White’s contention, therefore, Villalobos did identify White as the perpetrator in a photographic lineup.

Circumstantial evidence also supports White’s identity as the perpetrator. Still photographs taken from a surveillance camera inside the store show the robber wore a denim jacket with distinctive stitching. The jacket in the photographs matches a jacket found in a search of White’s house. Moreover, the manner in which this robbery was committed strongly resembles the two other Baskin Robbins store robberies for which

White was convicted (counts 1 and 2 and counts 7 and 8). In all of these robberies, the perpetrator entered the store near closing time, ordered ice cream and then asked for money, telling the employees he wanted the money in the safe in addition to that in the register.

Based on Villalobos's identification of White in a photographic lineup, the fact White's denim jacket matched that worn by the robber and the similarity between the ice cream store robbery on February 19, 2002 and the other ice cream store robberies committed by White, we cannot say no rational trier of fact reasonably could have concluded White committed the robbery charged in count 5. "Unless the evidence of identity is so weak as to constitute no evidence at all, this court cannot set aside the decision of the trial court. [Citations.]" (*People v. Shaheen* (1953) 120 Cal.App.2d 629, 637.)

*c. Count 13*

White also contends the evidence of identity is insufficient to prove he robbed a storage facility in Harbor City on April 19, 2002 as charged in count 13 because the victim did not positively identify him in a photographic lineup and did not accurately describe his height. Again, the record belies his argument.

The victim of the robbery, Miriam Garcia, circled White's picture in a photographic lineup and wrote "most likely" as to whether she thought it was a picture of the perpetrator. In addition, still photographs taken from a surveillance camera at the storage facility show the robber wore a matching Hawaiian-type shirt and hat, which were similar in color and design to shirts and hats seized in the search of White's home. This evidence, viewed in the light most favorable to the judgment, reasonably supports the jury's conclusion it was White who robbed the Harbor City storage facility on April 19, 2002. (*People v. Shaheen, supra*, 120 Cal.App.2d at p. 637.)

Contradictions or conflicts in the evidence, such as the testimony by several of White's witnesses that he was at his brother's house for a birthday party for some period on April 19, 2002 or the discrepancy between White's actual height and the estimate provided by Garcia, do not require a different result. The jury was free to weigh the

evidence and reject the testimony on which White relies to argue he did not commit the robbery charged in count 13. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1258-1259 [“It is blackletter law that any conflict or contradiction in the evidence, or any inconsistency in the testimony of witnesses must be resolved by the trier of fact who is the sole judge of the credibility of the witnesses”]; see also *People v. Lewis* (2001) 26 Cal.4th 334, 361 [““Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citations.]””].)

## *2. The Consecutive Sentences Imposed on Counts 2 and 8 Are Proper*

The trial court imposed nine consecutive sentences, one each for the eight counts of robbery and the one count of cocaine possession for which White was convicted. White concedes consecutive sentencing was mandatory on six of the robbery convictions and the conviction for cocaine possession pursuant to section 667, subdivisions (c)(6) and (c)(7), but contends the trial court improperly failed to exercise its discretion to consider imposing the sentences for counts 2 and 8 to run concurrently with those for counts 1 and 7. White asserts that concurrent sentences for these two counts are permissible because the robbery in count 2 was committed at the same time and arose from the same set of operative facts as that in count 1 (two victims of a single store robbery) and the robbery in count 8 was similarly committed at the same time as that in count 7.<sup>4</sup> White’s argument misinterprets the governing statutory provisions and misconstrues the trial court’s sentencing decision.

Section 667, subdivisions (c)(6) and (c)(7), address consecutive sentencing in Three Strikes cases when the defendant has current convictions for more than one

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<sup>4</sup> If the sentences for counts 2 and 8 were to run concurrently with the other sentences imposed by the trial court, as White asserts, White’s aggregate state prison term would be 235 years to life rather than the aggregate term of 295 years to life imposed by the trial court.

felony.<sup>5</sup> Under section 667, subdivision (c)(6), consecutive sentencing is mandatory “for any current felony not committed on the same occasion, and not arising from the same set of operative facts. Consecutive sentencing is not mandated under subdivision (c)(6) if the current felonies are committed on the same occasion or arise from the same set of operative facts[;]” sentences for those convictions may, in the discretion of the trial court, be either consecutive or concurrent (or some combination of consecutive and concurrent) to the aggregate term imposed for the current felonies “not committed on the same occasion and not arising from the same set of operative facts.” (*People v. Hendrix* (1997) 16 Cal.4th 508, 512-513.)

Subdivision (c)(7) of section 667 is invoked when the defendant’s current convictions are for more than one *serious* or *violent* felony. Pursuant to subdivision (c)(7), if two or more current convictions are for serious or violent felonies that were not committed on the same occasion and did not arise from the same set of operative facts, consecutive sentences must be imposed for each of those convictions *and*, in addition, the aggregate term for those convictions must be served consecutively to the aggregate sentence imposed for any additional current felony convictions. (§ 667, subd. (c)(7) [sentences for current serious or violent felonies not committed on the same occasion and not arising from the same set of operative facts must run consecutively to “the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law”].) All that is left to the trial court’s discretion is the decision

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<sup>5</sup> Subdivision (c)(6) provides, “If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to [the time periods specified in] subdivision (e).” (See also § 1170.12, subd. (a)(6).) Subdivision (c)(7), in turn, provides, “If there is a current conviction for more than one serious or violent felony as described in paragraph (6) of this subdivision, the court shall impose the sentence for each conviction consecutive to the sentence for any other conviction for which the defendant may be consecutively sentenced in the manner prescribed by law.” (See also § 1170.12, subd. (a)(7).)

whether to run the individual terms for any additional current felony convictions consecutively to or concurrently with each other.

To interpret subdivision (c)(7) without the additional requirement that the aggregate sentence for the current serious or violent felonies not committed on the same occasion and not arising from the same set of operative facts run consecutively to the aggregate term for any additional felony convictions, as White suggests, would simply track the provisions of subdivision (c)(6) and render subdivision (c)(7) superfluous. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459 [“Where reasonably possible, [courts] avoid statutory constructions which render particular [statutory] provisions superfluous or unnecessary”]; see also *In re Mehdizadeh* (2003) 105 Cal.App.4th 995, 1005.) Indeed, the Supreme Court has expressly stated that subdivisions (c)(6) and (c)(7) of section 667 “are not duplicative”: Subdivision (c)(6) applies to *any* current felony, while subdivision (c)(7), with its more extensive requirement for mandatory consecutive sentencing, applies when more than one of the defendant’s current convictions is a *serious* or *violent* felony. (*People v. Hendrix, supra*, 16 Cal.4th at p. 513.)

Here, section 667, subdivision (c)(7), is applicable because White was convicted of eight robberies, which constitute “serious” felonies under section 1192.7. White concedes, as he must, that six of those robberies (counts 1, 4, 5, 7, 13 and 14) were not committed on the same occasion and did not arise from the same set of operative facts; they involved discrete acts on different dates and locations against separate victims over a two and one-half month period. (See *People v. Lawrence* (2000) 24 Cal.4th 219, 233 [“not committed on the same occasion” means convictions “not committed within close temporal and spacial proximity of one another”; “not aris[ing] from the same set of operative facts” means “not sharing common acts or criminal conduct that serves to establish the elements of the current felony offenses of which defendant stands convicted”].) Consecutive sentences, therefore, were mandatory on counts 1, 4, 5, 7, 13,



14 and 15,<sup>6</sup> and that aggregate term also had to run consecutively to the aggregate term imposed on the additional current felonies convictions on counts 2 and 8. Thus, the trial court retained discretion only to decide whether the individual sentences on counts 2 and 8 should run consecutively to or concurrently with each other.

With respect to that discretionary choice, before imposing sentence, the trial court stated on the record it found no mitigating circumstances and numerous aggravating circumstances, any one of which supports imposition of consecutive terms, including that the crimes involved the threat of great bodily harm, the victims were particularly vulnerable, the manner in which the robberies were carried out demonstrated sophistication, White's conduct indicated a serious danger to society, his crimes were numerous and of increasing seriousness and he had served a prior prison term and was on probation or parole at the time the instant offenses were committed.<sup>7</sup> (Cal. Rules of Court, rules 4.21, 4.25; *People v. Davis* (1995) 10 Cal.4th 463, 552 ["Only one criterion

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<sup>6</sup> Pursuant to section 667, subdivision (c)(6), the sentence for cocaine possession (count 15) must run consecutively to the felonies committed on different occasions even though it is not a serious or violent felony subject to the provisions of subdivision (c)(7).

<sup>7</sup> The trial court stated, "I'll share with you that the aggravating circumstances are substantial. This is a robbery which is a crime of violence. That has a great threat to great bodily harm. The victims in these particular cases, store keepers, shop owners, or Baskin-Robbins employees, working probably for minimum wage are vulnerable people. People that work for mom and pop stores, working for minimum wages, trying to make a better life have to be faced with armed robbery. The serial robberies in this case were [carried] out with great sophistication. The individual that did it waited until close to closing time when there is sufficient amount of funds before committing the robbery. . . . One point which is, this is a very serious danger to society. The people going out there robbing committing armed robbery. Mr. White's background has serious prior convictions as an adult, or sustained petitions in juvenile, including increased seriousness. He served a prison term. He has not performed well on parole or probation. And this last time when he was committing all these crimes, he violated parole in doing so." "I also view these crime as individual discre[te] crimes, with individual discre[te] victims in this particular case."

or factor in aggravation is necessary to support a consecutive sentence”].) Thus, the consecutive sentences imposed for each of White’s convictions are proper.<sup>8</sup>

3. *The Restitution and Parole Revocation Fines Imposed by the Trial Court Exceed Statutory Limits and Must Be Modified*

When a defendant is convicted of a felony, the trial court must impose a restitution fine in an amount “commensurate with the seriousness of the offense,” but not less than \$200 and not more than \$10,000, “unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record.” (§ 1202.4, subds. (a)(3)(A), (b)(1) & (c).) The \$10,000 maximum applies ““regardless of the number of victims or counts involved.” [Citation.]’ [Citations.]” (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534.) If a term of parole is included in the defendant’s sentence, the trial court

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<sup>8</sup> To the extent, if any, the United States Supreme Court’s decision in *Blakely v. Washington* (2004) \_\_\_ U.S. \_\_\_ [124 S.Ct. 2531, 159 L.Ed.2d 403] applies to consecutive sentencing, its requirement for jury findings has been satisfied in this case. The jury by its verdicts expressly found beyond a reasonable doubt the robberies White had committed (counts 1, 4, 5, 7, 9, 13 and 14) and his conviction for cocaine possession (count 15) occurred on different dates over a period of two and one-half months. These jury findings support application of section 667, subdivisions (c)(6) and (c)(7), because the robberies necessarily were not committed on the same occasion and did not arise from the same set of operative facts. The jury’s findings also support the discretionary imposition of consecutive sentences, which the trial court based, in part, on the fact White had committed serial robberies, crimes of violence involving the threat of great bodily harm. (*People v. Shaw* (Sept. 15, 2004, C043228) \_\_\_ Cal.App.4th \_\_\_ [*Blakely* satisfied for purposes of consecutive sentencing based on jury’s findings that defendant committed separate assaults against different victims].)

We note that Division 5 of our court recently held in *People v. Sykes* (2004) 120 Cal.App.4th 1331 that *Blakely* does not apply to the imposition of consecutive sentences based on the finding the offenses were not committed on the same occasion and did not arise from the same set of operative facts. Division One of the Fourth District held in *People v. Ochoa* (Sept. 2, 2004, D042215) \_\_\_ Cal.App.4th \_\_\_ that *Blakely* does not apply to a trial court’s discretionary decision to sentence consecutively on two counts. (See also *People v. Vonner* (2004) 121 Cal.App.4th 801 [*Blakely* does not apply to the imposition of consecutive sentences under § 667.6, subd. (c), when a defendant is convicted of a violent sexual offense and a second felony offense].) The California Supreme Court has granted review of *People v. Black* (S126182, rev. granted July 8, 2004), a case involving the application of *Blakely* to consecutive sentencing.

also must assess an additional fine, in the same amount as the restitution fine imposed under section 1202.4, that is suspended unless the defendant's parole is revoked. (§ 1202.45.)

Here, the trial court imposed a \$20,000 restitution fine and a \$20,000 parole revocation fine. These fines, as the People concede, were unauthorized because they exceed the statutory maximum of \$10,000. (*People v. Blackburn, supra*, 72 Cal.App.4th at p. 1534 [trial court's imposition of \$20,000 restitution fine under § 1202.4 constitutes an unauthorized sentence because that amount "could not lawfully be imposed"].) We, therefore, modify the judgment to reflect a restitution fine of \$10,000 and a commensurate parole revocation fine of \$10,000.<sup>9</sup>

#### 4. No Basis Exists for Granting White's Petition for Habeas Corpus

White filed a petition for writ of habeas corpus while his appeal was pending, contending the trial court's refusal to order a live lineup before trial denied him due process and his trial counsel provided ineffective assistance by failing both to properly present motions for a live lineup and to effectively cross-examine witnesses regarding their prior inconsistent descriptions of the person who robbed them. Because a petition for writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden to plead and later prove sufficient grounds for relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) White has not met his burden.

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<sup>9</sup> White contends that, instead of reducing the amount of the restitution and parole revocation fines to \$10,000 each, we should remand for the trial court to determine the appropriate amount. Given the trial court's prior imposition of a fine that is twice the statutory maximum and section 1202.4, subdivision (b)(2)'s provision that a fine may be determined as the product of \$200 multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts for which the defendant has been convicted (which would have totaled \$531,000 in this case), modifying the judgment to the statutory \$10,000 maximum is the appropriate remedy. (See *People v. Blackburn, supra*, 72 Cal.App.4th at p. 1534 [modifying judgment to reduce restitution fine to statutory maximum of \$10,000 when trial court originally imposed a \$20,000 fine].)

In light of the strong corroborative evidence establishing White as the perpetrator of the eight robberies for which he was convicted, the trial court did not abuse its discretion by determining eyewitness identification was not a material issue in the case. Accordingly, fundamental fairness did not require a live lineup. (*Evans v. Superior Court* (1974) 11 Cal.3d 617, 625-626.) White's ineffective assistance of counsel claim also fails because he cannot demonstrate it is reasonably probable he would have obtained a better result at trial if his counsel had included additional information in the motion for a live lineup or had cross-examined certain witnesses regarding their prior descriptions of the person who robbed them. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [defendant cannot prevail on ineffective assistance claim without establishing counsel's performance fell below an objective standard of reasonableness and a reasonable probability exists he or she "would have obtained a more favorable result absent counsel's shortcomings"].)

#### **DISPOSITION**

The judgment is modified to reflect a restitution fine of \$10,000 and a parole revocation fine of \$10,000. As modified, the judgment is affirmed. The petition for writ of habeas corpus is denied.

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PERLUSS, P. J.

We concur:

JOHNSON, J.

ZELON, J.